vided all the aid apparently necessary and commenced the removal immediately upon the arrival of the train at the station. He took charge of his wife, with her acquiescence and approval, before the accident occurred, and neither he nor either of his two friends were selected for the purpose by the company, nor directed or controlled by it at the time of the injury. The jury were properly instructed, and could not, under the evidence adduced, have properly found any other verdict.

[7] The petition also assigns as error the overruling of some objections offered by the plaintiff to the reception of certain testimony offered by the defendant, and to the sustaining of other objections made by the defendant to the admission of certain testimony tendered by the plaintiff. We cannot consider these assignments because they are not presented in the record either by bills of exceptions or by certificates of exception provided for by the act approved March 21, 1916 (Acts 1916, p. 708). Even if these objections had been properly presented by the record, they would not change the result.

Judgment affirmed.

SPROUL et al. *v.* HUNTER et al.

Nov. 15, -917.

[94 S. E. 179.]

1. Executors and Administrators (§ 388 (6)*)—Judicial Sale of Realty—Deficiency in Acreage—Right to Relief.—Where executors of decedent's estate, composed in part of a large farm, had invoked the aid of the court in the administration of the estate and discharge of their duties as executorial trustees, the court having assumed jurisdiction of the parties and the subject-matter, and from time to time having entered decrees in furtherance of the objects of the executors' suit, it was the duty of the executors, whatever their powers under the will, to submit to the court for approval a transaction whereby they were to sell the farm; and where an executor's acceptance of the purchasers' tentative offer to buy was expressly made subject to confirmation by the court, a qualified acceptance, approved by his co-executors and received by the purchasers without objection, while the petition and decree prepared for the court's action was submitted to counsel for the purchasers, a decree ordering sale being entered without objection, the sale was a judicial sale, under the applicable principle of caveat emptor, and the purchasers were

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

not entitled to relief for a supposed deficiency in acreage, testator's will, the source of the executor's title, and the peition for sale having apprised them that the farm was supposed to contain 775 acres.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 569.]

2. Executors and Administrators (§ 327)*)—Sale of Property—Right to Invoke Aid of Equity—Effect of Testamentary Provision.—Though executors have power under the will to sell property belonging to the estate, the possession of such power in no way deprives them of the right to go into a court of equity for aid and guidance in the discharge of their duties, and to have the property under its decrees.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 564.]

Appeal from Corporation Court of Staunton.

Suit by H. B. Sproul and another against C. S. Hunter and E. B. Burke, executors of the will of Robert W. Burke, deceased. From a decree dismissing the petition, plaintiffs appeal. Affirmed.

Rudolph Bumgardner, of Staunton, for appellants.
J. M. Perry, of Staunton, for appellees.

WHITTLE, J. The essential facts and circumstances of this litigation will sufficiently appear from the discussion of the questions involved.

In the year 1905, the executors and trustees under the will of Robert W. Burke, deceased, filed a bill for conformity against the beneficiaries of the estate, in the corporation court of the city of Staunton, invoking the instruction and direction of the court in the discharge of their duties. The bill also contained the prayer that plaintiffs be authorized to sell certain bank stock belonging to the estate to pay debts, that proper compensation be allowed the executors, that they be permitted from time to time to settle their accounts in the suit, and for general relief. The corporation court assumed jurisdiction of the suit and the administration of the estate, making the necessary orders therein as occasion required, and the case has remained on the docket hitherto.

Among other property belonging to the estate was a valuable farm located in the vicinity of Staunton, which is described in the will as containing about 775 acres. The will invested the executors with extensive powers as trustees in the management of the estate, and authorized them, in their discretion, to sell, publicly or privately, and convey any real estate owned by the

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

testator at his death, and to reinvest the proceeds upon the trusts set out in the will; but, in case of sale of the 775-acre farm, the proceeds were directed to be invested separately and kept apart from the rest of the estate, such proceeds to stand as the representative and substitute of the farm for all purposes of the will. The executors, conceiving that a sale of the farm would be advantageous, listed the same with a real estate agent to procure a purchaser, and it was described by the agent as containing 800 acres. The agent procured appellants as prospective purchasers, and on January 19, 1917, they submitted to him an offer in writing to purchase the farm, "containing approximately 800 acres, * * * together with all implements, horses, harness, and colts on the place, including also the corn fodder, and growing crops, exclusive of the tenants' share," for $50,000; $10,000 in cash on delivery of a good and sufficient deed, and the residue to be evidenced by five bonds, each for the principal sum of $8,000, bearing 6 per cent. interest, payable in one, two, three, four, and five years, with privilege of anticipating any or all of the said bonds at any regular interest period. On the same date the appellee, Hunter, addressed to the real estate agent his acceptance of the offer, "subject to the approval of my coexecutor, E. Butler Burke, and the further confirmation of the court." The coexecutor having signified his approval of the conditional acceptance of Hunter, the executors, on January 20th, filed their petition in the suit for conformity, in which they alleged that they were invested with full power and authority by testator's will to sell any part of the estate, including the 775-acre farm, the proceeds of which, in the event of a sale, were to be reinvested in accordance with the provisions of the will; that they were satisfied that a sale would promote the interests of all persons interested in the estate, yet they did not care to take that step without first securing the approval and direction of the court, which had theretofore been and still was engaged in the administration of the estate; that it was for the purpose of obtaining the sanction and approval of the court that they filed their petition; that, if the court concurred in the opinion of petitioners that the farm should be sold, they prayed to be authorized to employ a real estate agent to assist them in effecting the sale. The petitioner concluded with the general prayer for a decree directing the sale and reinvestment of the proceeds. On the same day the court passed a decree, directing the executors to sell the farm in pursuance of the power of their petition.

Accordingly, by deed bearing even date with the petition and decree, a conveyance was made by the executors to appellants, H. B. Sproul and D. G. Ruckman, reciting, among other things the decree of the corporation court authorizing and directing the executors to sell the farm at their discretion, and in their judg-

ment, and for the consideration named in the written proposal, of the farm in question, described as "containing 800 acres more or less." On January 22d the executors received the cash payment and bonds for the deferred installments, and delivered the deed to the purchasers. On January 27th they filed their report of sale, which recited that the sale was made "in pursuance of the decree entered herein on January (20) 1915," the receipt of the cash payment and bonds for the purchase price, and conveyance of the land to the purchasers. The executors requested the approval by the court of their action, and that the sale be confirmed. Thereupon the court entered a decree declaring that the trustees had properly exercised their discretion under the will, that the sale had been made in pursuance of the former decree, that the land brought a fair price, that the action of the trustees in connection therewith was approved, and therefore ratified and confirmed the sale. The decree also approved and confirmed the compensation allowed the real estate agent and directed its payment.

On March 11th the purchasers filed their petition in the cause, in which, after setting out the terms of their offer to purchase the land, they represented that the farm was composed of four contiguous tracts of land, containing in the aggregate 806 acres and 30 poles; that petitioners' purchase included the four tracts, and that the sale was consummated on January 22d (by payment of $10,000 and the delivery of the bonds) in accordance with the written offer on their part, and the delivery of the deed by the executors; that the sale was by the acre and the farm was guaranteed to contain 800 acres, the purchase price being $48,000, of $60 per acre; that the additional $2,000 constituted the price of the personal property on the land, which was sold along with the farm, making the total consideration $50,000, as set out in the deed. The petition went into details in respect to the alleged shortage in acreage, which it is unnecessary to relate, and prayed an abatement of the purchase money to the extent of the alleged deficiency in the land.

The executors made specific answer to all the material averments of the petition, and controverted petitioners' right to any relief in the premises. The cause was heard on the pleading and evidence, and the decree under review dismissing the petition was entered.

In their answer respondents suggested that, if the court should be of opinion that petitioners had been misled to their injury, the proper measure of relief would be to place all parties in statu quo by rescinding the sale.

We are of opinion that in no aspect of the case were appellants entitled to relief.

I. At the date of appellants' offer to purchase the farm, E.

B. Burke was living in the city of Washington; his coexecutor, C. S. Hunter, was on the ground and practically conducted the negotiations on behalf of the estate. The farm was estimated by the testator in his will to contain about 775 acres, and Hunter did not observe that the deed to Sproul and Ruckman described it as 800 acres, more or less. Immediately on his attention being called by Sproul to the claim of the purchasers for an abatement of the purchase money on account of the alleged shortage, the following colloquy ensued: Sproul suggested that he would have the land surveyed, in which suggestion Hunter acquiesced, and remarked, "If the farm ran over—decidedly over," with the approval of the court, the purchasers would get the benefit of the excess. But Sproul insisted that Hunter should also guarantee the shortage, if any, which he declined to do. He proposed, however, to return the cash payment and deliver up the bonds, and bear the loss of the revenue stamps on the deed, "and call the matter off." This counter proposition Sproul declined, remarking that he had paid a fee for examining the title. Hunter then expressed his willingness to bear one-half of that expense, but Sproul rejected both offers. In point of fact the land has never been surveyed, and the alleged deficiency was not otherwise shown to exist.

[1] II. Viewing the controversy from a different angle, we are of opinion that the sale was a judicial sale. The minds of the parties never met on any other hypothesis. The executors had already invoked the aid and direction of the court in the administration of the estate and the discharge of their duties as executorial trustees. The court had assumed jurisdiction of the parties and the subject-matter, and, from time to time, entered decrees in furtherance of the objects of the suit. In these circumstances, it was plainly the duty of the executors, whatever may have been their powers under the will, to submit this transaction, perhaps the most important that had arisen in the course of their administration, to the judgment and decision of the court. Accordingly, Hunter's acceptance of appellants' tentative offer to purchase the farm was expressly made subject to the confirmation of the court. This qualified acceptance was approved by his coexecutor and received without objection by the appellants; and there is nothing in the record to suggest bad faith on the part of the executors in pursuing that course. The procedure adopted by counsel for the executors to effectuate the purpose of the parties was customary and proper. The petition and decree prepared for the court's action were submitted to counsel for the appellants, and (with full opportunity for examination, and investigation of matters to which they called attention), without objection, the decree ordering the sale was entered; and

subsequently the report of sale, likewise without objection, was approved and confirmed by a decree of the court.

[2] It is the settled rule in this state that, although executors have power under the will to sell the property belonging to the estate, the possession of such authority in no way deprives them of the right to go into a court of equity for aid and guidance in the discharge of their duties, and to have the property sold under its decrees. Shepherd *v.* Darling, 120 Va. —, 91 S. E. 737; Gooch *v.* Old Dom. Tr. Co., 121 Va. ——, 92 S. E. 846.

Testator's will was the source of appellants title, and that instrument and the petition for the sale apprised the intending purchasers that the farm for which they were negotiating was supposed to contain 775 acres. Still they stood by and suffered the court to direct the sale upon that assumption, and afterwards to confirm it, without objection. At a subsequent term, it is true, they sought the aid of the court to relieve themselves from the consequences of an assumed deficiency of acreage in the farm. But we think it clear that the sale was a judicial sale, and the doctrine is well settled in this jurisdiction that the principle of caveat emptor strictly applies to judicial sales. Speaking generally, all objections of which the party complaining had previous knowledge came too late after a decree of confirmation. The case of Long *v.* Weller, 29 Grat. (70 Va.) 347, 371, is a leading case on the subject. The opinion was delivered by Burks, J., who cites in support of the principle above announced the following cases: Threlkelds *v.* Campbell, 2 Grat. (43 Va.) 198, 44 Am. Dec. 384; Daniel *v.* Leitch, 13 Grat. (54 Va.) 195, 212, 23; Watson *v.* Hoy, 28 Grat. (69 Va.) 698 711.

There is striking resemblance between the case in judgment and that of Terry *v.* Coles, 80 Va. 695, 700-702; indeed, the two cases are not distinguishable in principle. In the latter case it was held:

"Sale made by order of a court of competent jurisdiction, pendente lite, is a judicial sale. An executor having authority under the will to sell land, declines to exercise his authority, but applies to the court for instructions and directions, and is ordered to make sale and [to] report it to the court for confirmation, whereupon he makes and reports the sale to the court as ordered, such a sale is a judicial sale."

These cases sufficiently illustrate the controlling principles involved in this case, and render the further review of the authorities unnecessary.

Upon the whole case, we think the decree of the corporation court was plainly right, and it must be affirmed.

Affirmed.